



JUN 19 2007

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

COPY

ANDREW SHALABY, an individual,  
and SONIA DUNN-RUIZ, an  
individual,

Plaintiffs,

vs.

NEWELL RUBBERMAID, INC., a  
Delaware Corporation; THE HOME  
DEPOT, INC., a Delaware  
Corporation,

Defendants.

Case No. C 06 7026 CW

DEPOSITION OF ROBERT KEVIN PRICE

San Diego, California

Wednesday, May 30, 2007

Reported by:  
FRAUKE KUO

EXHIBIT C

1 San Diego, California, Wednesday, May 30, 2007,  
2 12:40 p.m. - 1:30 p.m.

3  
4 ROBERT KEVIN PRICE,  
5 having been first duly sworn, was examined and testified  
6 as follows:

7  
8 EXAMINATION

9 BY MR. MOORHEAD:

10 Q. Let's begin by having you give us your full name  
11 for the record, please.

12 A. Robert Kevin Price.

13 Q. Mr. Price, as I understand it from conversations  
14 before we went on the record, you prefer to go by Kevin,  
15 because your dad is also Robert.

16 A. That's what I go by.

17 Q. So if I call you Kevin today, will that be okay?

18 A. That's fine.

19 Q. What is your business address?

20 A. Business address? Where I work, you mean?

21 Q. Yes.

22 A. I am not sure of the address. It's the fire  
23 station.

24 Q. Station 21?

25 A. No. It's in Pala now.

1 Q. Does it have a station number there?

2 A. They just have one station.

3 Q. And it's Pala?

4 A. P-a-l-a.

5 Q. Pala -- P-a-l-a. Okay.

6 And is there a good phone number there to reach  
7 you, Kevin?

8 A. It would be 760 Area Code, 742-1632.

9 Q. Okay. How about either a home number or a cell  
10 phone number where we can reach you if we have trouble  
11 reaching you at that number.

12 A. My home number is (760) 510-1169. My cell phone  
13 is (760) 705-5247. I don't call it very often, so it's  
14 hard to remember.

15 Q. I understand. By whom are you currently  
16 employed?

17 A. Mercy Ambulance.

18 Q. And in Pala?

19 A. Yes.

20 Q. And that's up in north county someplace?

21 A. Yeah.

22 Q. And what's your position with Mercy Ambulance?

23 A. Paramedic.

24 Q. Okay. By whom were you employed on April the  
25 21st, 2006?

1 A. I was a student with Palomar College.

2 Q. And in addition to studying at Palomar, were you  
3 part-time employed or --

4 A. Full-time student.

5 Q. Were you interning?

6 A. Yes.

7 Q. Okay. And with whom?

8 A. It was Station 21, and Joe Russo was my preceptor  
9 with San Diego Rural Metro.

10 Q. All right. On April the 21st, 2006, Kevin, were  
11 you among San Diego Fire Department personnel that  
12 responded to a call for emergency assistance at Campland  
13 on the Bay involving burn injuries to an adult male?

14 A. Yes.

15 Q. If you can recall, what Fire Department vehicles  
16 were dispatched to the scene?

17 A. I believe it was Medic 21 and Engine 21.

18 Q. Okay. Medic 21 would have been a paramedic  
19 ambulance?

20 A. Yes.

21 Q. Is that what you traveled in?

22 A. Yes.

23 Q. And you would have traveled there with Joe Russo.  
24 And let me see if I can get some of the other names.

25 A. Donald Renshaw, he was the EMT driver.

1 Q. Okay. It looks like about seven Fire Department  
2 personnel responded to this incident. Does that sound  
3 essentially correct, with your recollection?

4 A. That sounds right.

5 Q. Now, none of the people that responded to this  
6 particular incident had to be involved in fire  
7 suppression; did they? You didn't have to put out any  
8 fires?

9 A. No.

10 Q. Some of you were involved in caring for the fire  
11 victim or victims; is that correct?

12 A. Correct.

13 Q. And who would that have been? You and who else?

14 A. It was me. And I think you said his name was  
15 Daniel, the EMT driver, and Joe Russo. We were the  
16 transporting -- We were the ones that transported. And  
17 the engine was also on scene, but it was mainly us who  
18 transported.

19 Q. Tell me specifically what you did at the scene,  
20 Kevin.

21 A. As far as from the beginning of the call to the  
22 end?

23 Q. Let's just take it from when you arrived at the  
24 site of the incident.

25 A. Okay. When I arrived at the site of the

10  
1 incident, I remember he was sitting -- I think it was near  
2 a camp fire. He didn't have any inhalation burns. He was  
3 breathing okay. First off, I got lung sounds, T-Sat which  
4 was good. He was breathing good. At that point, we put a  
5 burn dressing on, trying to maintain his body temperature.

6 He was at the back of the ambulance, so we  
7 brought the gurney up next to him, assisted him to the  
8 gurney, and got him in the back of the ambulance.

9 Q. And transported?

10 A. And transported.

11 Q. Let's slow our speed cadence down and take it  
12 step by step.

13 A. Okay.

14 Q. You arrive at the scene. He is sitting  
15 especially, you can recall, near a camp fire?

16 A. Yes.

17 Q. Okay. Your first concern was his breathing, and  
18 so you went and checked to see what his expiration rate  
19 was, heart rate?

20 A. Yes.

21 Q. And you checked to see if there was soot or  
22 particulates around the mouth and nose?

23 A. Correct.

24 Q. You checked his oxygen saturation rate --

25 A. Yes.

1 A. Yes.

2 Q. All right. So you assessed the burn injuries,  
3 and you put -- What did you describe you put on it, some  
4 kind of compress or something?

5 A. It's just called a burn dressing. It's just to  
6 maintain his body temperature and try to keep moisture  
7 inside.

8 Q. Okay. And would you have been obtaining  
9 information from him, like his height, his weight, his  
10 allergies and things like that?

11 A. Yes.

12 Q. Okay. Now, we had Captain Spangler in here this  
13 morning, and he kind of helped educate us as to how the  
14 system worked at that time.

15 It's my understanding that the engine company  
16 would have had a Palm Pilot, and the paramedic ambulance  
17 would have maybe a couple of them. And he said he would  
18 have been inputting some of the information that ends up  
19 on the report, and you guys would have been inputting  
20 others.

21 A. Right.

22 Q. Okay. If you look at the report -- And, by the  
23 way, here is a copy of it if you don't have one with you.

24 A. Okay.

25 Q. Can you determine, from looking at it -- and take



1 your time looking at it, if you want -- what information  
2 on there you inputted as opposed to him or someone else?

3 A. Okay. The vital signs -- The initial vital signs  
4 were probably inputted by him.

5 Q. Okay. And that's on page 1. You are talking  
6 about his pulse, respiration, and blood pressure and  
7 stuff?

8 A. Right.

9 Q. Okay.

10 A. And on page 2, "History: Allergies, Meds," that  
11 could have been him or I. I am not sure. "Secondary"  
12 could have been him or me, too, on page 2.

13 Q. Okay.

14 A. The "Intervention" was me.

15 Q. Okay. How about the "Special Questions  
16 Narrative"?

17 A. And the narrative, that was me.

18 Q. Okay. Then, below that, there is something we  
19 determined means "Secondary Exam Narrative." Is that  
20 something you would have inputted, him, or someone else?

21 A. That was me.

22 Q. Okay. And then, below that, there is an "I,"  
23 which stands for --

24 A. "Incident."

25 Q. Okay. So that's a brief description.

1 A. Okay.

2 Q. -- and we will mark it as Exhibit 8 to this depo  
3 as well.

4 (Defendants' Exhibit No. 8 was marked for  
5 identification by the court reporter.)

6 MR. MOORHEAD: Okay.

7 BY MR.. MOORHEAD:

8 Q. Now, the stuff that you input into the -- into  
9 this report would have been done by a Palm Pilot?

10 A. Correct.

11 Q. Was that done at the scene, during transport,  
12 after the call was over, or some combination of those?

13 A. Combination.

14 Q. Okay. And when I look at the hard copy version  
15 of this report, it appears that some of the print is in --  
16 in bold. Is that the stuff that's, basically, in the form  
17 and you just fill in the blanks?

18 A. I believe so.

19 Q. Okay. Do your best, if you can, Kevin, to read  
20 for me what it was that you inputted under "History," just  
21 so I am not guessing. In other words, read it like you  
22 were intending. You don't have to use abbreviations.  
23 What does it say?

24 A. "Patient was kicking around a propane torch. It  
25 went into a fire and blew up and burned him. Family

1 called 911."

2 Q. Do you know -- and I realize it's been over a  
3 year ago, and you have responded to many other things --  
4 whether or not the information you gathered that goes into  
5 the "History" section was obtained directly from  
6 Mr. Shalaby, the patient, or from other sources?

7 A. I --

8 Q. Do you know whether that information was imparted  
9 to you when you were at Mr. Shalaby's side? In other  
10 words, he could have heard somebody say how it happened  
11 when that was communicated to you?

12 A. Sorry. I don't understand that question.

13 Q. Okay. I think you told us earlier you are not  
14 sure whether what's in the "History" section was given to  
15 you by Mr. Shalaby, by someone else at the scene, or  
16 perhaps someone like Captain Spangler.

17 A. Right.

18 Q. What I am asking is: Do you remember where you  
19 received that information physically? So I am asking  
20 whether it was possible that Mr. Shalaby, if he wasn't the  
21 reporting person -- whether he could have heard someone  
22 else saying it, or is this told to you back at the  
23 station, while you were en route, or by something where he  
24 might not be able to hear?

25 A. I am not sure, but I would think it would have

1 Fire Department that received -- that responded to the  
2 scene that evening inspected it in any way?

3 A. Not that I'm aware of.

4 Q. Do you know if anyone photographed it in any way?

5 A. Not that I'm aware of.

6 Q. Do you know of any photographs that were taken at  
7 the scene of the incident that day?

8 A. No.

9 Q. Do you have any idea, as you sit here today,  
10 Kevin, what became of the propane torch that was mentioned  
11 in the report?

12 A. No.

13 Q. Did you make any determination at the scene as to  
14 whether the victim, at the time of the incident, was under  
15 the influence of alcohol, medication, drugs, or anything  
16 else?

17 A. I do remember seeing beer bottles, I believe. I  
18 don't know if they were beer bottles, could have been  
19 cans, but I don't remember whether or not he was under the  
20 influence. I didn't document it.

21 Q. Okay. I notice there is nothing in the report  
22 about it.

23 A. Right.

24 Q. Do you have any independent recollection of --

25 A. I do vaguely remember him being intoxicated, but

1 I am not sure.

2 Q. Okay. And if that -- if that is an accurate  
3 recollection, what was the source of that information? I  
4 mean, did you smell it on his breath?

5 A. I think that was just it. It was just smelling  
6 it on his breath.

7 Q. You didn't take any blood tests to determine the  
8 level of intoxication?

9 A. We just checked his blood sugar. We don't take  
10 blood tests for that kind of thing.

11 MR. MOORHEAD: I don't believe I have any other  
12 questions for you at this time. Mr. Epstein represents  
13 the plaintiffs, and he may have some for you.

14

15 EXAMINATION

16 BY MR. EPSTEIN:

17 Q. Can I call you Kevin as well?

18 A. Sure.

19 Q. We met briefly off the record. I am Mark  
20 Epstein, for the record, and I represent the plaintiff,  
21 Andy Shalaby, and his wife in this lawsuit. I will do my  
22 best to speak slower, realizing --

23 A. Me too.

24 Q. -- again, it would be good if we both did that.  
25 Before I get to what I was going to ask you,



MAY 9 2007

1

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

ANDREW SHALABY, an )  
individual, and SONIA )  
DUNN-RUIZ, an individual, )

Plaintiffs, )

vs. )

Case No. C 06 7065 CW

NEWELL RUBBERMAID, INC., a )  
Delaware Corporation, THE )  
HOME DEPOT, INC., a )  
Delaware Corporation, )

Defendants. )

COPY

DEPOSITION OF:

JOE RUSSO

WEDNESDAY, APRIL 18, 2007

Reported by: Sally D. Phelps  
CSR 3485

EXHIBIT D

10

1 Again if you were to say uh-huh Mr. Epstein and  
2 I might say was that a yes, not because we're surprised  
3 that you were saying uh-huh but because we want to make  
4 sure when someone reads this later that they know that  
5 that's what you were saying.

6 Like I told you before we got started I don't  
7 expect this to last much more than an hour or so. We're  
8 going to try to get you out of here as soon as possible  
9 but if you need to take break for whatever reason whether  
10 it's work related or you just want to use the men's room  
11 or whatever let us know.

12 Even though there is a light bulb hanging from  
13 here I don't have a rubber hose. I'm not going to try to  
14 punish you in any way. I'm going to get your best  
15 testimony and get you on your way.

16 Do you have any questions about what we're going  
17 to do before we get started?

18 A. No.

19 Q. If any come up please feel free to stop us and  
20 ask us so we can clarify it for you. I should probably  
21 get an address from you. Do you have an address you can  
22 give me?

23 A. Home address or work address? I'll give you  
24 work address.

25 Q. All right. That's fine.



1 A. Now, I know we said I can't look at them, but  
2 can they tell me my work address?

3 Q. If you don't remember it say I don't remember  
4 what my work address is.

5 A. I don't remember what it is right off the  
6 moment.

7 Q. Is it a station number?

8 A. Well, let me give you this address here. It's  
9 1010 Second Avenue, suite No. 300, San Diego 92101.

10 Q. Okay. Is that probably the best address to try  
11 to find you if we need you in the future on this case?

12 A. For this case, yes.

13 Q. What's your date of birth, Joe?

14 A. 6/24/70.

15 Q. By whom are you currently employed?

16 A. San Diego Medical Services Enterprise. It's a  
17 Rural/Metro Corporation.

18 Q. That's their address on Second Avenue that you  
19 gave me?

20 A. That is our fire department headquarters where  
21 all EMS is taken care of for the fire department and  
22 Rural/Metro.

23 Q. How long have you worked for San Diego Medical  
24 Services Enterprise?

25 A. Off and on now for approximately four years,

1 Q. Depending on the information that came in?

2 A. Depending on the information they retained.

3 Q. The paramedic vehicle that you rode on was an  
4 ambulance as well as the equipment?

5 A. I was on the paramedic ambulance, not the  
6 engine.

7 Q. Right. That one was truly an ambulance in the  
8 sense you could transport people from the scene?

9 A. Correct. It was a paramedic ambulance.

10 Q. Did any other, for the sake of example, private  
11 company ambulances respond to that incident if you can  
12 recall?

13 A. No.

14 Q. In all these questions, Joe, I'm just asking for  
15 your best recollection. So they may seem kind of  
16 specific, but just give me your best recollection on some  
17 of these things.

18 Upon your arrival do you know what your role was  
19 on this particular call?

20 A. Yes. At that point I had an intern as I do now,  
21 and it was my job to oversee the intern as he does  
22 patient care. And our job is strictly patient assessment  
23 and care.

24 Q. Was that intern Mr. Price?

25 A. Correct.

1 thought may have occurred.

2 Q. Did anybody assist you in that function?

3 A. Bonnie may have and also Captain Spangler.

4 Q. Captain Spangler may have or you're sure he did?

5 A. May have.

6 Q. As part of that function -- when I use that  
7 function in the rest of these questions in that area I'm  
8 talking about that information gathering function as  
9 opposed to treatment.

10 A. Okay.

11 Q. In that function that you were performing did  
12 you interview the victim at all?

13 A. I did not but my intern did.

14 Q. So now we're talking about Mr. Price?

15 A. Robert Price, yes.

16 Q. Were you present when that interview took place?

17 A. Yes.

18 Q. What information was gathered from the victim  
19 concerning what had happened? Again if there is  
20 something there that will help you feel free to refer to  
21 it, if there is not anything there --

22 A. There is. I have his initial of what he got,  
23 and I stood over him and my best recollection was I  
24 remember the patient stating that he kicked something.  
25 He kicked the thing into the fire and it exploded.

1 Q. Did he elaborate at that time on what he meant  
2 by the thing?

3 A. He did say it was a propane.

4 Q. So you understood that he was telling you that  
5 he had kicked some type of compressed gas cylinder into a  
6 campfire basically?

7 A. Yes.

8 Q. All right. Mr. Price would have been present  
9 when he made that statement because he was the one that  
10 was actually interviewing him.

11 A. Yes.

12 Q. Were there any more members of your fire  
13 department team that would be able to confirm or disprove  
14 that this is what he was saying that you know of?

15 A. I don't know. Maybe all of them, maybe none. I  
16 don't know.

17 Q. But you're sure at least you and Mr. Price,  
18 Robert Price?

19 A. Correct.

20 Q. Any other information, limiting it just now to  
21 the victim, that was provided to you about what had  
22 happened? In other words, maybe he elaborated on why he  
23 kicked it into the fire, how he kicked it into the fire,  
24 or maybe it wasn't him that kicked it into the fire it  
25 was somebody else in his presence, anything like that?

1 scene? Do you know whether anybody from the fire  
2 department, whether it be the engine company or the  
3 paramedics with whom you were working took custody of it  
4 at the scene?

5 A. No, I don't know.

6 Q. No, you don't know?

7 A. No, I do not know.

8 Q. If such a thing were to occur would that be  
9 something typically the engine company would do?

10 A. Ask me that one more time.

11 Q. Sure. If somebody from the fire department  
12 decided that items at the scene needed to be taken into  
13 custody as part of your overall investigation is that  
14 something that would typically be done by the folks in  
15 the engine company?

16 A. Yes.

17 Q. Does the fire department as a whole, I'm  
18 including the paramedics, EMT's, engine companies, do  
19 they in the typical instance like this one reach a final  
20 consensus conclusion as to what happened or do they just  
21 have you put out a report like that and that's the end of  
22 the story?

23 A. On my end this is what we do. We put out a  
24 report like this, and that's the end of the story. On  
25 their end I do not know. We're one entity but we're

1 separate.

2 Q. Let me show you what we were provided as a  
3 report in connection with this. Maybe you can compare  
4 that with what you've got in front of you. If there is  
5 additional stuff we need to get from you we'll make  
6 copies of that.

7 A. This is exactly what I have.

8 Q. Okay. Nothing less, nothing more?

9 A. Nothing less. Only the top sheets of paper  
10 about this whole meeting.

11 MR. MOORHEAD: Okay. We don't need those.  
12 We're going to mark this as the next exhibit in order.  
13 This will be Exhibit 8.

14 (Exhibit 8 marked for identification.)

15 BY MR. MOORHEAD:

16 Q. You've had an occasion I guess because you knew  
17 you were coming here to take a look at this so you're  
18 familiar essentially with what's in it?

19 A. I took a brief look, yes. This came to me on  
20 very short notice.

21 Q. Because I'm not familiar with the process maybe  
22 I'm going to go through it in more detail than is  
23 necessary, but the first section of this looks like it's  
24 called call information, and it looks like somebody has  
25 recorded where the incident occurred, a phone number,

1 loaded miles would -- actually looking back that loaded  
2 miles is the amount of miles it took to get from there to  
3 the hospital.

4 Q. From Campland to the hospital?

5 A. Correct.

6 Q. It looks like below is the list of responding  
7 fire department personnel?

8 A. Yes.

9 Q. Your name is in bolder print. Maybe you're more  
10 important; is that right?

11 A. Because I was the paramedic on record. Not any  
12 more important.

13 Q. Then it looks like there is a place for the  
14 patient to sign if he wants to?. Is that it?

15 A. Correct. That's actually would be our  
16 signatures.

17 Q. Okay.

18 A. That would actually be.

19 Q. This one that I have doesn't bear your  
20 signature?

21 A. Neither does this one. Maybe only the original  
22 does.

23 Q. You would expect if we found the original it  
24 would have your signature on it?

25 A. I hope so.

May 01 07 05:10p

William R. Phelps

8583147800

p.3

SDMSE Patient Report - FS06035953

Page 1 of 7

[Edit Audit Report](#)

SAN DIEGO MEDICAL SERVICES ENTERPRISE - Billing Report - 04/21/2006 - M21

INC#: FS06035953 QA Net#: 2412526 TapChart ID: 8528936003228463569

Call Information (From CAD)Demographics

Address: 2211 Pacific Beach Dr  
 City: SAN DIEGO  
 Zip: 92109  
 Phone: 949-340-5572  
 Notes: 45m, burns to legs and hands

Dispatch: Burns / Explosion (L1)  
 Hospital: UCSD Medical Center

Incident Times

TimeInQue: 04/21/2006  
 22:09:23  
 Assigned: 04/21/2006  
 22:10:58  
 Enroute: 04/21/2006  
 22:12:34  
 Staged:  
 On Scene: 04/21/2006  
 22:16:47  
 Depart: 04/21/2006  
 22:31:41  
 Arrive Hosp: 04/21/2006  
 22:45:22  
 Clear: 04/21/2006  
 23:21:12

Patient Information (From TapChart)

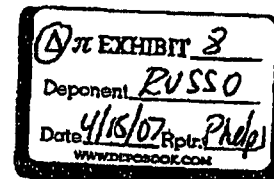
Name: Shalaby, Andrew W DOB: 10/07/1960  
 C/C: Moderate Status Burn - 45 Y/O M 180 lbs.  
 GCS: 15 RTS: 12

BRIM:

GCS: 15 B: Normal  
 E: 4 R: Oriented X 3  
 V: 5 I: Spont  
 M: 6 M: Obeys Cmds

VITALS:

Pulse: 62  
 Resp: 18  
 BP: 130/70  
 EKG: NSR No Ect No ST Ch  
 Eyes: R: 3 mm PERL L: 3 mm PERL  
 LOC: GCS: 15 E: 4 V: 5 M: 6  
 Lungs: R: Clear L: Clear  
 Sat: 96% a O2 - 100% p O2  
 Skins: Normal Normal Normal  
 Sugar: 102  
 Temp:



P 0440



May 01 07 05:11p William R. Phelps

8583147800

P. 4

SDMSE Patient Report - FS06033333

Page 2 of 4

Date	Time	Pulse	BP	Resp	EKG
04/22/2006	21:22:29	62	130/70	18	NSR - No Ect - No ST Ch
04/22/2006	21:39:00	62	110/p	18	
04/22/2006	21:39:00	62	110/p	18	

History: anxiety

Allergies: PCN

Medications: zoloft, xanax

## SECONDARY:

Head: Negative - Unremarkable  
 Upper Extrem: Lt Rt Hand 2nd degree burn.  
 Chest: Negative - Unremarkable  
 Abdomen: Negative - Unremarkable  
 Back: Negative - Unremarkable  
 Pelvis: Negative - Unremarkable  
 Lower Extrem: Lt Rt Lower leg 2nd degree burn.

## INTERVENTION:

04/22/2006 21:39:58 EKG Monitor - NSR  
 04/22/2006 21:40:20 Sat before O2 - 96%  
 04/22/2006 21:40:22 Sat with O2 - 100%  
 04/22/2006 21:42:00 NS 1000 ml 500 Fluid Bolus BHO - Robert Price (Intern)  
 04/22/2006 21:43:00 O2 4 LPM w/ Canula SO - Robert Price (Intern)  
 04/22/2006 21:43:00 MS 4 mg IVP SO - Robert Price (Intern)  
 04/22/2006 21:43:00 MS 4 mg IVP BHO - Robert Price (Intern)  
 04/22/2006 21:45:25 Blood Sugar - 102

## Special Questions Narrative:

Burn caused by explosion. No cooling measures before EMS arrival. No associated SOB. Burn did not occur in a confined space.

## 2' Exam Narrative:

Total 1' burns: %. Total 2' burns: %. Total 3' burns: %. There are circumferential burns. Burns involve the feet. No soot in pt's airway. No singed nasal hair. No singed facial hair.

I:

45 Y/O male found in sitting position.

C:

Burn -

P 0441

May 01 07 05:11p

William R. Phelps

8583147800

P.5

SDMSE Patient Report - FS06035933

Page 3 of 4

H:  
pt was kicking around a propane torch it went into the fire and blew up and burned him. family called 911.

A:  
pt a/ox4. vitals listed. secondary. no neck or back pain, no loc. pt had 3rd degree burns to outside of his left hand. and 2nd degree to both calves circumferentially. approx 18% bsi.

R:  
listed

T:  
No change in patient while enroute hospital. Full report given to receiving facility. IV(s) patent and flowing well.

burn center criteria.

Assigned Base: 30  
Base Contacted: 35  
Requested Hosp: 35  
Nearest Hosp: 30  
Destination: UCSD Medical Center  
Dest Reason: Resource Issue  
Resource Issue: Burn  
Loaded Mileage: 7  
Transport Codes: 3 10

Robert Spangler P0311 E21-City of San Diego ALS

Alfred Allen III H9696 E21-City of San Diego ALS

Christopher Herse H9587 E21-City of San Diego ALS

Bonnie Martin P1253 E21-City of San Diego ALS

Daniel Nenow I11431 M21-City of San Diego ALS

Robert Price (Intern) I6904 M21-City of San Diego ALS

Joseph Russo P1748 M21-City of San Diego ALS

Patient Person Signature: \_\_\_\_\_

SDMSE - Billing

Patient Address:  
7525 Leviston

P.0442

May 01 07 05:11p William R. Phelps

8583147800

p.6

SDMSE Patient Report - FS06035955

Macarrito CA 94530

## Rastock List

#	Code	Item
7	90009	Gloves, Latex Free pair
1	82110	Sheet, Fitted
1	82100	Sheet, Flat
1	82145	Pillow Case
1	85100	ECG Pads Adult
1	84663	Glucose Strips
1	91009	IV Solution- 1000 ml
1	21001	IV Tubing- Maxi
1	90011	IV Tubing- Select 3
1	22061	IV Cath 14-20 ga
3	87100	Alcohol Prep
1	25211	Tourniquet
1	73010	4X4 Non-sterile
1	25221	Veniguard
1	10500	Oxygen
1	52101	Nasal Canula
1	01055	MS

P 0443

<http://10.200.100.3/cadview/viewTapChartReport.asp?id=8528936003228463569&f>

0... 7/12/2006

**FILED**

AUG 16 2007

RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

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Worthington Industries, Inc.

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

ANDREW SHALABY, an individual, and SONIA  
DUNN-RUIZ an individual,

Plaintiffs,

vs.

IRWIN INDUSTRIAL TOOL COMPANY, THE  
HOME DEPOT, INC., and DOES 2 through 100,  
inclusive,

Defendants.

BERNZOMATIC,

Third Party Plaintiff,

vs.

WESTERN INDUSTRIES, INC.,  
WORTHINGTON INDUSTRIES, AND DOES 2  
through 100, inclusive,

Third Party Defendants.

Case No.: C06-07026 MJJ

Judge Martin J. Jenkins

**THIRD PARTY DEFENDANT  
WORTHINGTON INDUSTRIES, INC.'S  
MOTION TO TRANSFER VENUE**

Date: September 25, 2007  
Time: 9:30 a.m.  
Ctmm: 11, 19<sup>th</sup> Floor

**BY FAX**

**NOTICE OF MOTION**

PLEASE TAKE NOTICE that on September 25, 2007, at 9:30 a.m. in Courtroom 11 of the  
above-entitled Court, located at 450 Golden Gate Avenue, San Francisco, California 94102, Third Party  
Defendant Worthington Industries, Inc. ("Worthington") will move the Court for an order that the

1 above-captioned case be transferred to the United States District Court for the Southern District of  
2 California in San Diego.

3  
4 **STATEMENT OF RELIEF**

5 Pursuant to 28 U.S.C. Section 1404(a), Worthington brings this motion to transfer this action to  
6 the Southern District in San Diego based on the interests of justice and convenience of the witnesses, as  
7 all key third party witnesses work and reside in Southern California. If the venue is transferred to the  
8 Southern District, the parties will be more likely to be able to offer the witnesses' testimony live and the  
9 witnesses will be the least inconvenienced.

10 This Motion is based on the documents and exhibits filed herewith, including this Notice of  
11 Motion, Memorandum of Points and Authorities, Request for Judicial Notice, the Declaration of  
12 Cathleen S. Huang, and such other evidence and argument as may be presented on the hearing of this  
13 Motion.  
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7  
8  
9 UNITED STATES DISTRICT COURT  
10 NORTHERN DISTRICT OF CALIFORNIA

11 ANDREW SHALABY, an individual, and SONIA  
DUNN-RUIZ an individual,

12 Plaintiffs,

13  
14 vs.

15 IRWIN INDUSTRIAL TOOL COMPANY, THE  
HOME DEPOT, INC., and DOES 2 through 100,  
inclusive,

16 Defendants.

17  
18 BERNZOMATIC,

19 Third Party Plaintiff,

20  
21 vs.

22 WESTERN INDUSTRIES, INC.,  
WORTHINGTON INDUSTRIES, AND DOES 2  
through 100, inclusive,

23 Third Party Defendants.  
24  
25  
26  
27  
28

Case No.: C06-07026 MJJ

Judge Martin J. Jenkins

**THIRD PARTY DEFENDANT  
WORTHINGTON INDUSTRIES, INC.'S  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION TO TRANSFER VENUE**

Date: September 25, 2007  
Time: 9:30 a.m.  
Ctmm: 11, 19<sup>th</sup> Floor

**MEMORANDUM OF POINTS AND AUTHORITIES**

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## I. INTRODUCTION

Third Party Defendant Worthington Industries, Inc. ("Worthington"), contemporaneously with filing its Answer, brings this motion to transfer this action to the Southern District in San Diego based on the interests of justice and convenience of the witnesses. While Worthington was just brought into this products liability action, the case has been pending for some time. Worthington's counsel has had the opportunity to review the deposition transcripts of five third party witnesses, who have been deposed. These San Diego area witnesses are critical to the defense of Plaintiffs' claims of product defect.

On April 21, 2005, Plaintiff Andrew Shalaby suffered serious burn injuries from a fire while camping in San Diego, California. Shalaby and his wife allege that fire was caused by a defect in their MAPP gas torch and/or cylinder, which Shalaby claims he was using to attempt to light a campfire. However, various third party witnesses who reside and work in the San Diego area have offered contradictory testimony as to how the accident occurred. Specifically, their testimonies would establish that Shalaby's conduct (including banging the torch against a hard surface and kicking the torch into the camp fire), rather than the alleged defect, caused the incident.

Consistent with Shalaby banging the cylinder against a hard surface is the fact that there was a hole on the top of the cylinder observed after the accident by two of these San Diego witnesses. However, the cylinder and torch were discarded shortly after the accident. Consequently, the only evidence of the physical condition of the cylinder after the accident will be the testimony of two campground rangers who observed the crack in the cylinder and described its size, location and nature. Their testimony will serve as the factual foundation for the expert witnesses to opine on the cause of the accident.

Having the trial in Northern California will likely prevent the defendants from putting on live testimony of some or all of the critical witnesses. In lieu of live testimony, defendants will likely have to offer critical testimony into evidence by reading deposition transcripts. To the extent that defendants are able to convince or compel any of the third party witnesses to travel 500 miles to testify, such will be a substantial burden on and inconvenience to the witnesses.

Accordingly, pursuant to 28 U.S.C. Section 1404(a), the interests of justice and the convenience

1 of the witnesses demand that this action be transferred to the Southern District in San Diego where  
 2 defendants will be able to offer the witnesses' testimony live and where the witnesses will be the least  
 3 inconvenienced.

## 4 II. STATEMENT OF FACTS

5 In early to mid 2005, Shalaby allegedly purchased a Bernzomatic MAPP Gas torch kit from a  
 6 Home Depot store located in El Cerrito, California. The kit allegedly included a torch and a yellow  
 7 MAPP Gas cylinder filled with MAPP Gas. (Plaintiffs' First Amended Complaint ("FAC") attached as  
 8 Exhibit A to Request for Judicial Notice ("RJN") at ¶ 9.) Shortly thereafter, Shalaby purchased several  
 9 replacement cylinders. (FAC ¶ 11.) MAPP Gas is typically used for welding and soldering due to its  
 10 high combustion temperature of 5301 degrees Fahrenheit (2927 degrees Celsius). (Joint Case  
 11 Management Statement ("JCMS") RJN Exh. B at p. 2, § 1a.) In place of its conventional use, Shalaby  
 12 regularly used his torch to light campfires. (JCMS, p. 2, § 1b.)

13 During the week of April 17, 2006, Shalaby, Plaintiff Dunn-Ruiz, and their two children were  
 14 vacationing at a recreational vehicle park known as "Campland on the Bay" located in San Diego,  
 15 California. (JCMS, p. 2, § 1b.) Shalaby took his torch and MAPP Gas cylinders with him on this trip.  
 16 Shalaby claims that on April 21, 2006 when he attempted to light a campfire using his torch, the  
 17 cylinder exploded and/or discharged its contents, causing Shalaby to suffer burn injuries. (FAC ¶¶ 20-  
 18 22.)

19 Key third party witnesses including camp rangers, Randy Stephens and Warren Ratliff, and  
 20 paramedics, Robert Price and Joe Russo, all work and reside in the Southern California area. (The  
 21 deposition transcripts of Randy Stephens, Warren Ratliff, Robert Price, and Joe Russo are attached as  
 22 Exhibits A to D to the Declaration of Cathleen S. Huang ("Huang Decl."). See Huang Decl. Exh. C,  
 23 Price dep. 5:10-6:21; Huang Decl. Exh. A, Stephens dep. 9:1-22; Huang Decl. Exh. B, Ratliff dep. 8:5-  
 24 9:4; Huang Decl. Exh. D, Russo dep. 10:19 – 11:9.) They offer the following testimony, which is  
 25 highly probative on the issue of causation.

26 Ranger Randy Stephens was on duty at Campland on the day of the incident. (Huang Decl. Exh.  
 27 A, Stephens dep. 11:7-10.) Fellow campers witnessed the incident and one camper reported it and  
 28

1 Ranger Stephens was radioed to go to the site of the incident. (Huang Decl. Exh. A, Stephens dep.,  
 2 10:4-14; 11:7-19.) Stephens went to the accident scene and heard Shalaby repeating out loud: "I'm an  
 3 idiot. I can't believe I'm so stupid." "This is all my fault." (Huang Decl. Exh. A, Stephens dep.,  
 4 35:11-24.)

5  
 6 Stephens has experience with MAPP gas and torches. (Huang Decl. Exh. A, Stephens dep.,  
 7 48:9-23.) Based on his observations, the torch being used was not a proper torch for a MAPP gas  
 8 cylinder. (Huang Decl. Exh. A, Stephens dep., 49:8-50:18.)

9  
 10 Warren Ratliff is also a ranger at Campland. (Huang Decl. Exh. B, Ratliff dep., 9:8-22.) Ratliff  
 11 went to the accident scene along with the fire department and paramedics. (Huang Decl. Exh. B, Ratliff  
 12 dep., 17:23-18:7.) At the scene, Ratliff spoke to neighboring campers. (Huang Decl. Exh. B, Ratliff  
 13 dep., 18:21-19:2.) Among other things, campers told him that Shalaby had attempted to light a  
 14 campfire with his torch and when he was unsuccessful, he became "frustrated" and started banging the  
 15 torch on the campfire ring. (Huang Decl. Exh. B, Ratliff dep., 19:7-20:23.)

16 Ratliff made an hour-long examination of the torch and cylinder after the incident. (Huang  
 17 Decl. Exh. B, Ratliff dep., 66:20-23.) Based on his examination, Ratliff felt that the torch apparatus  
 18 may have been improperly attached to the cylinder or not placed fully in the "on" position. (Huang  
 19 Decl. Exh. B, Ratliff dep., 31:5-13.) Ratliff has extensive experience with MAPP gas torches, having  
 20 used them to weld pipes together while he worked as a certified welder for the Navy, a plumber, and as  
 21 a maintenance person. (Huang Decl. Exh. B, Ratliff dep., 56:5-7, 58:22-25, 59:6-12, and 62:21-65:10.)

22 During his examination, Ratliff made many observations of the torch and cylinder remnants as  
 23 follows. Ratliff observed a crack in the cylinder that appeared to have been caused by banging the  
 24 cylinder against a hard surface. (Huang Decl. Exh. B, Ratliff dep., 67:21-70:19.) Ratliff noted that the  
 25 threaded neck of the cylinder just above the edge of the crack tilted away from the crack at a slight  
 26 angle, which suggested to Ratliff that the torch may have been banged against something, thereby  
 27 adjusting the threaded area of the cylinder. (Huang Decl. Exh. B, Ratliff dep., 70:10-19; 72:17-73:4)  
 28 Ratliff said the crack was at the top of the cylinder at the point where the cylinder body tapered to the

1 threaded neck and where the torch apparatus was attached. (Huang Decl. Exh. B, Ratliff dep., 67:21-  
2 25; 68:20-24.) The edges of the crack appeared to have been forced outward from the interior of the  
3 cylinder as if from an explosion. (Huang Decl. Exh. B, Ratliff dep., 68:1-10.) When Ratliff picked up  
4 the torch and cylinder, the torch apparatus was still attached, but it was loose and did not appear to be  
5 screwed on entirely. (Huang Decl. Exh. B, Ratliff dep., 73:5-10.)

6 Ranger Stephens made similar observations of the cylinder. (Huang Decl. Exh. A, Stephens dep.  
7 42:14-43:1.) In particular, he observed a split approximately two-and-a-half inches long and a quarter  
8 inch wide at the neck of the cylinder. (Huang Decl. Exh. A, Stephens dep. 42:14-43:1.) He also saw  
9 that the cylinder had burst open just beyond the threads at the neck. (Huang Decl. Exh. A, Stephens  
10 dep. 42:1-7.)

11 Paramedic Robert Price responded to this accident as an intern for Station 21 of the San Diego  
12 Fire Department. (Huang Decl. Exh. C, Price dep., 6:15-7:14.) Price treated Shalaby at the scene.  
13 (Huang Decl. Exh. C, Price dep., 9:5-10:10.) Price saw beer bottles at the campsite and smelled alcohol  
14 on Shalaby's breath. (Huang Decl. Exh. C, Price dep., 22:13-23:6.)

15 Price was one of the persons that inputted information into what eventually became the fire  
16 department report. (Huang Decl. Exh. C, Price dep., 12:12-13:21) One of Price's entries into the report  
17 reflects:

18 "Patient was kicking around a propane torch. It went into a fire and blew up and  
19 burned him. Family called 911." (Huang Decl. Exh. C, Price dep., 19:19-20:1.)

20 Price wasn't sure whether this statement was made to him by Shalaby or someone else. (Huang  
21 Decl. Exh. C, Price dep., 20:13-17.) However, Price's supervisor, Joe Russo, was present when Price  
22 was interviewing Shalaby. (Huang Decl. Exh. D, Russo dep., 14:3-25; 22:6-17.) Russo heard Shalaby  
23 state that he had kicked a "propane" cylinder into the fire and that it exploded. (Huang Decl. Exh. D,  
24 Russo dep., 22:18-23:7.)

25 An unidentified engineer with fire department told Stephens and Ratliff that the fire department  
26 did not need to take possession of the torch or cylinder. (Huang Decl. Exh. A, Stephens dep., 61:22-  
27 62:4; Huang Decl. Exh. B, Ratliff dep., 35:5-36:7.) Stephens recalls that the engineer said that they did  
28 not need the evidence because:

1  
2 "...the gentleman in question, the patient, as they stated, had already told them, and  
that it was an accident." (Huang Decl. Exh. A, Stephens dep., 61:22-62:4.)

3 Including Price and Russo, seven persons from San Diego Fire Department Station 21 responded to this  
4 incident. (Huang Decl. Exh. D, Russo dep., 29:17-30:20; 45:6-8; Exhibit 8.)

5  
6 Ratliff took the cylinder and torch back to the ranger station where it remained for two or three  
7 days. (Huang Decl. Exh. B, Ratliff dep., 36:15-21.) Thereafter, Ratliff believes that another staff  
8 member at the campground threw the torch and cylinder away. (Huang Decl. Exh. B, Ratliff dep.,  
9 37:15-17.)

10 Plaintiffs originally filed this action in Alameda Superior Court naming Newell Rubbermaid,  
11 Inc. ("Newell") and The Home Depot, Inc. ("Home Depot") as defendants. The case was removed to  
12 the Northern District. Thereafter, plaintiffs filed an amended complaint in which Home Depot remains  
13 a defendant, but Irwin Industrial Tool Company, Inc. ("Irwin") was named in place of Newell.  
14 Bernzomatic, a division of Irwin, has sued Worthington and Western for indemnity in a third party  
15 complaint.  
16

### 17 III. LEGAL ARGUMENT

#### 18 A. Pursuant to 28 U.S.C. Section 1404(a), Venue Should Be Transferred to the 19 Southern District of California Because It Is The Most Convenient Forum For All 20 Key Witnesses

21 Motions to transfer venue are governed by 28 U.S.C. Section 1404(a), which provides:

22 [f]or the convenience of the parties and witnesses, in the interest of justice, a  
23 district court may transfer any civil action to any other district or division  
where [the action] might have been brought.

24 The purpose of Section 1404(a) is: "to prevent the waste of 'time, energy and money' and to protect  
25 litigants, witnesses, and the public against unnecessary inconvenience and expense." *Van Dusen v.*  
26 *Barrack*, (1964) 376 U.S. 612, 616. Since all of the key third party witnesses in this case live and work  
27 in the San Diego area, this case should be transferred to the Southern District for their convenience.  
28

1                   **1. The Southern District has Personal and Subject Matter Jurisdiction over the**  
 2                   **Parties and is a Proper Venue**

3                   As a threshold matter, the moving party of a motion to transfer venue must show that the forum  
 4 to which they seek to transfer is a forum in which the action originally might have been brought. See  
 5 *Hoffman v. Blaski*, (1960) 363 U.S. 335, 344; 28 U.S.C. § 1404, subd., (a). The California District  
 6 Courts have interpreted this to mean that “[t]he transferee court must have had complete personal  
 7 jurisdiction over defendants, subject matter jurisdiction over the defendants, and proper venue had the  
 8 claim originally been brought in that court.” *Royal QueenTex Enterprises, Inc. v. Sara Lee Corp.* (N.D.  
 9 Cal. 2000) 2000 U.S. Dist. LEXIS 10139, 8. (Referencing *Hoffman*, 363 U.S. at 343-344.)  
 10

11                  Here, all three of these requirements are satisfied. None of the defendants or third party  
 12 defendants contest personal jurisdiction. The court has proper subject matter jurisdiction because there  
 13 is diversity of citizenship<sup>1</sup> and because the claim exceeds \$75,000.<sup>2</sup> Venue in the Southern District is  
 14 proper under 28 U.S.C. Section 1391(a)(2)<sup>3</sup> in that the accident giving rise to this action occurred  
 15 within the Southern District.  
 16

17                   **2. The Most Important Factor – “Convenience of the Witnesses” – Weighs In**  
 18                   **Favor of a Transfer**

19                  Once a court has determined that an action could have originally been brought in a different  
 20

---

21                  <sup>1</sup> There is complete diversity among the Plaintiffs, the Defendants, and Third Party Defendants.  
 22 Plaintiffs are citizens of California. Defendant Irwin Industrial Tool Company, Inc. is a Delaware  
 23 corporation, with its principal place of business in North Carolina. Defendant The Home Depot, Inc. is  
 24 a Delaware corporation, with its principal place of business in Georgia. Worthington is incorporated in  
 25 and has its principal place of business in Ohio. Third Party Defendant Western Industries, Inc., is  
 26 incorporated in and has its principal place of business in Wisconsin.

27                  <sup>2</sup> Shalaby’s past medial specials alone exceed \$300,000.

28                  <sup>3</sup> 28 USCA Section 1391(a)(2) provides: “[a] civil action wherein jurisdiction is founded only  
 on diversity of citizenship may, except as otherwise provided by law, be brought only in (2) a judicial  
 district in which a substantial part of the events or omissions giving rise to the claim occurred, or a  
 substantial part of property that is the subject of the action is situated.”



1 district, it must then determine whether the transfer would further the "convenience of parties and  
 2 witnesses" and "the interest of justice." *Royal Queentex, supra* at 7. The district court has discretion to  
 3 adjudicate motions for transfer according to "an individualized, case-by-case consideration of  
 4 convenience and fairness." *Jones v. GNC Franchising, Inc.*, (9th Cir. 2000) 211 F.3d 495, 498. The  
 5 courts weigh eight factors to determine whether a transfer is appropriate in a particular case:

6  
 7 (1) plaintiff's choice of forum, (2) convenience of the parties, (3) convenience of the  
 8 witnesses, (4) ease of access to the evidence, (5) familiarity of each forum with the  
 9 applicable law, (6) feasibility of consolidation of other claims, (7) any local interest  
 10 in the controversy, and (8) the relative court congestion and time of trial in each forum.

11 *Royal Queentex, supra*. at 7-8. Among the eight factors, "convenience of the witnesses" is the most  
 12 important. *Amini Innovation Corp. v. JS Imps., Inc.*, (C.D. Cal. 2007) 2007 U.S. Dist. LEXIS 43758,  
 13 \*43-46; *Accord Royal Queentex, supra* at 18; *Decter v. Gill* (ED. Cal. 2006) 2006 U.S. Dist. LEXIS  
 14 90415, \*7; See also *A. J. Industries, Inc. v. U. S.*, (9th Cir. 1974) 503 F.2d 384, 386-87 (discussing the  
 15 importance and history of the convenience of witnesses in a Section 1404(a) transfer).

16 Federal Rules of Civil Procedure Rule 45(b)(2) permits service of a trial subpoena anywhere in  
 17 California based on the fact that California state court statutes allow for such. Regardless, the practical  
 18 reality is that the defendants will be unable to arrange for most, let alone all, of the critical witnesses to  
 19 travel from the San Diego area to Northern California to testify at trial. The witnesses may have  
 20 compelling reasons not to travel and spend one or more nights away from their homes and work. The  
 21 witnesses' cooperation may be thoroughly tainted by the inconvenience of being compelled to travel to  
 22 Northern California. Or the witnesses may simply not come. In *Polaroid Corp. v. Casselman*,  
 23 (S.D.N.Y. 1962) 213 F. Supp. 379, 382 (cited in *Pacific Car and Foundry Co. v. Pence* (9<sup>th</sup> Cir. 1968)  
 24 403 F.2d 949, 954 and in *Vivoli v. Vivoli's* (C.D. Cal. 1984) 606 F.Supp. 106, 108), the Court  
 25 recognized that "even if the witnesses are willing to travel to [plaintiff's choice of forum] the parties  
 26 would be subjected to expense, the witnesses to inconvenience, and the trial, in all likelihood, to  
 27  
 28

1 interruption and delay. All of this can be avoided by trial in [the more convenient forum.]” Thus, the  
2 interests of justice cry out for this case being transferred to the Southern District.

3 If the trial were in San Diego, the witnesses could simply be on standby and appear at trial on  
4 short notice. Further, if their testimony were not completed by the end of the court day, they would be  
5 able to return to their homes that night. In contrast, if the case remains in the Northern District, the  
6 witnesses will not have that luxury. Rather, they will have to travel 500 miles to San Francisco. They  
7 will have to spend the night away from home the day before their *scheduled* testimony and spend  
8 additional nights to the extent they are not called when scheduled or their testimony is not completed by  
9 the end of the court day.  
10

11 Perhaps keeping the case in the Northern District would be justified if it inconvenienced just one  
12 witness. However, Worthington has cited critical testimony of four separate witnesses. Moreover,  
13 there were five additional persons from the San Diego Fire Department at the scene who may also have  
14 critical testimony. (To date, only one of those persons has been deposed.) Further, the neighboring  
15 campers who witnessed Shalaby’s actions leading up to the accident may be called as witnesses.  
16 Finally, Shalaby’s initial treatment was at a hospital in the San Diego area. Thus, there may be well in  
17 excess of a dozen third party witnesses needed to testify at trial who live and work in the San Diego  
18 area.  
19

### 20 3. Whether Witnesses Can Testify Live Is Considered In A Motion to Transfer

21 In evaluating the effect of a transfer on the convenience of witnesses, courts consider the  
22 availability of certain witnesses and their live testimony at trial. *Polaroid, supra*, at 382. There is no  
23 question that Shalaby suffered serious burns and a jury will likely be sympathetic to his injuries.  
24 Worthington anticipates that Shalaby will deny banging his cylinder on a hard surface, kicking his  
25 cylinder into the fire or admitting fault for the accident. To counter Shalaby’s testimony, it will be  
26 critical to have the third party witnesses appear live at trial, as opposed to having to rely on reading  
27  
28



1 their deposition transcripts. Needless to say, reading the testimonies will greatly reduce their impact.

2 As the *Polaroid* Court aptly observed, presenting testimony by deposition does not have the same force  
3 and effect as live testimony and must be considered in a motion to transfer:

4  
5 Depositions, deadening and one-sided, are a poor substitute for live testimony  
6 especially where, as here, vital issues of fact may hinge on credibility. In  
7 determining credibility, there is nothing like the impact of live *dramatis personae*  
8 on the trier of the facts. Thus, the transfer which defendant seeks will not only  
9 serve the convenience of the witnesses but, more importantly, the ends of justice.

10 *Polaroid*, *supra* at 382-383.

11  
12 **4. The Testimonies of the Key Third Party Witnesses Are Critical As They Help  
13 Establish the Cause of The Accident.**

14 The testimonies of the third party witnesses are pivotal in this case – as they will help the trier of  
15 fact to determine how this accident occurred and whether any defective product caused, or contributed  
16 to the cause of, the accident. Based on the deposition testimonies cited above, it was Shalaby's  
17 conduct, rather than an alleged defect, that caused the accident. Specifically, the testimonies indicate  
18 that:

- 19 1. Shalaby became frustrated with his torch and banged the cylinder against a hard object.
- 20 2. Shalaby kicked the torch and cylinder into a fire.
- 21 3. Shalaby made admissions that he was "stupid" and at fault for the accident.
- 22 4. Shalaby did not fully connect the torch to the cylinder.
- 23 5. Shalaby used the wrong type of torch with the cylinder.

24 The testimonies of these lay witnesses are even more essential and valuable because the physical  
25 evidence has been discarded. Generally in product liability cases where physical evidence is available,  
26 liability often turns on the opinions of experts given after careful examination and testing of the product  
27 in question. Here, through no fault of their own, defendants' experts will have no such opportunity. To  
28 be able to opine on causation, it will be extremely important to the experts to know the nature of the  
damage to the cylinder, i.e. the location of the crack, the size of the crack, a description of the crack,

1 etc. Hence, without the cylinder and the torch, the experts will have to rely on the two rangers'  
 2 description of the physical damage, as the foundational facts to determine whether the potential theories  
 3 of the accident offered are consistent with the physical damage.

#### 4 5. Plaintiffs' Choice of Forum Has Little Connection to This Case

6 Worthington acknowledges that Plaintiffs' choice of forum is accorded weight in the court's  
 7 determination of the propriety of a transfer. However, if the Plaintiff's choice of forum has no real  
 8 connection with the litigation and the movant has made a strong showing of inconvenience, a transfer  
 9 should be granted. *See Pacific Car, supra* at 954; *Polaroid, supra*, at 383. Indeed, "[p]laintiff's choice  
 10 of forum, then, is not the final word." *Pacific Car, supra* at 954.

11 Besides being plaintiffs' domicile, this forum has tenuous nexus to the fundamental issue of this  
 12 case: the cause of the accident. In contrast, being the forum where the incident occurred and where the  
 13 key witnesses reside, the Southern District has a very significant connection. Worthington has clearly  
 14 identified who the inconvenienced witnesses will be, and what their testimony will be and how that  
 15 testimony will be relevant to this case. These witnesses will play critical roles in this case and a venue  
 16 change will have a significant impact on their convenience. Therefore, the scale significantly tips in  
 17 favor of a transfer.  
 18

#### 19 IV. CONCLUSION

20  
 21 The interests of convenience and justice favor transferring this case to the Southern District. If  
 22 the trial occurs in Northern California, witnesses critical to the defense of this matter will either not  
 23 appear or will suffer major inconvenience. The testimony of these witnesses does not involve minor  
 24 issues, but rather goes to the heart of how this accident occurred. Moreover, because the evidence has  
 25 been discarded, the only evidence of the physical condition of the cylinder – which will be critical to  
 26 expert analysis – will be the testimony of the two San Diego area witnesses. Because these witnesses  
 27 will contradict plaintiffs' version of the accident, it is imperative that the jury be able to observe the  
 28 live testimony rather than hear monotonous readings of deposition transcripts. Accordingly,

1 Worthington respectfully requests that this Court grant its motion to transfer venue to the Southern  
2 District.

3  
4 Dated: August 16, 2007

BOWLES & VERNAL LP

5  
6  
7 By:

  
RICHARD A. ERGO  
Attorneys for Third Party Defendant  
Worthington Industries, Inc.

**PROOF OF SERVICE**

(Shalaby v. Irwin – USDC, Northern District of California, Case No: C 06 7026 MJJ)

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years, and not a party to, or interested in the within entitled action. I am an employee of BOWLES & VERNA LLP, and my business address is 2121 N. California Blvd., Suite 875, Walnut Creek, California 94596.

On August 16, 2007, I served the following document(s):

**THIRD PARTY DEFENDANT WORTHINGTON INDUSTRIES, INC.'S MOTION TO TRANSFER VENUE;  
DECLARATION OF CATHLEEN S. HUANG; REQUEST TO TAKE JUDICIAL NOTICE; and [PROPOSED] ORDER**

on the following parties in this action addressed as follows:

**Attorneys for Plaintiffs**

Mark D. Epstein  
Alborg, Veiluva & Epstein LLP  
200 Pringle Avenue, Suite 410  
Walnut Creek, CA 94596  
Tel: (925) 939-9880  
Fax: (925) 939-9915

**Attorneys for Defendant and Third Party Plaintiff**

**Bernzomatic and Defendant The Home Depot**  
J. Phillip Moorhead  
Keller, Price & Moorhead  
229 Avenue I, 2<sup>nd</sup> Floor  
Redondo Beach, CA 90277-5600  
Tel: (310) 540-1332

**XXXX** (BY MAIL) I caused each such envelope, with postage thereon fully paid, to be placed in the United States mail at Walnut Creek, California. I am readily familiar with the business practice for collection and processing of mail in this office. That in the ordinary course of business said document(s) would be deposited with the U.S. Postal Service in Walnut Creek on that same day. I understand that service shall be presumed invalid upon motion of a party served if the postal cancellation date or postage meter date on the envelope is more than one day after the date of deposit for mailing contained on this affidavit.

— (BY PERSONAL SERVICE) I delivered each such envelope by hand to each addressee above.

— (BY OVERNIGHT DELIVERY) I caused each envelope, with delivery fees provided for, to be deposited in a box regularly maintained by UPS/FEDERAL EXPRESS. I am readily familiar with Bowles & Verna's practice for collection and processing of correspondence for overnight delivery and know that in the ordinary course of Bowles & Verna's business practice the document(s) described above will be deposited in a box or other facility regularly maintained by UPS/FEDERAL EXPRESS or delivered to an authorized courier or driver authorized by UPS/FEDERAL EXPRESS to receive documents on the same date that it is placed at Bowles & Verna for collection.

— (BY FACSIMILE) By use of facsimile machine number (925) 935-0371 or (925) 256-1755, I served a copy of the within document(s) on the above interested parties at the facsimile numbers listed above. The transmission was reported as complete and without error. The transmission report was properly issued by the transmitting facsimile machine.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that I am employed in the office of a member of the Bar of this Court at whose direction the service was made. Executed on August 16, 2007, at Walnut Creek, California.

  
DONNA WITHROW

FILED

07 AUG 16 PM 3: 36

RICHARD A. ERGO (# 110487)  
CATHLEEN S. HUANG (#219554)  
BOWLES & Verna LLP  
2121 N. California Boulevard, Suite 875  
Walnut Creek, California 94596  
Telephone: (925) 935-3300  
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[chuang@bowlesverna.com](mailto:chuang@bowlesverna.com)

RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

Attorneys for Third Party Defendant  
Worthington Industries, Inc.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

49  
8

ANDREW SHALABY, an individual, and SONIA  
DUNN-RUIZ an individual,

CASE NO.: C06-07026 MJJ

Judge Martin J. Jenkins

Plaintiffs,

vs.

**WORTHINGTON INDUSTRIES, INC.'S  
CORPORATE DISCLOSURE  
STATEMENT AND CERTIFICATION OF  
INTERESTED ENTITIES OR PERSONS**

IRWIN INDUSTRIAL TOOL COMPANY, THE  
HOME DEPOT, INC., and DOES 2 through 100,  
inclusive,

Defendants.

**BY FAX**

BERNZOMATIC,

Third Party Plaintiff,

vs.

WESTERN INDUSTRIES, INC.,  
WORTHINGTON INDUSTRIES, AND DOES 2  
through 100, inclusive,

Third Party Defendants.

Pursuant to Federal Rules of Civil Procedure Rule 7.1(a), Third Party Defendant Worthington Industries, Inc. ("Worthington") certifies that it does not have a parent corporation and that there is no publicly-held corporation that owns 10% or more of Worthington's stocks.

CASE NO.: C06-07026 MJJ

1

**WORTHINGTON INDUSTRIES INC.'S CORPORATE DISCLOSURE STATEMENT AND CERTIFICATION OF  
INTERESTED ENTITIES OR PERSONS**

1 Pursuant to the Northern District Court of California Civil Local Rules Rule 3-16, Worthington  
2 certifies that the following listed persons, associations of persons, firms, partnerships, corporations  
3 (including parent corporations) or other entities (i) have a financial interest in the subject matter in  
4 controversy or in a party to the proceeding, or (ii) have a non-financial interest in that subject matter or  
5 in a party that could be substantially affected by the outcome of this proceeding:  
6

7 Worthington's liability carriers are Travelers, ACE, XL, Zurich, Ohio Casualty, and Chubb.  
8  
9

10 Dated: August 16, 2007  
11

BOWLES & Verna LLP

12  
13 By: 

14 Richard A. Ergo  
15 Cathleen S. Huang  
16 Attorneys for Third Party Defendant  
17 WORTHINGTON INDUSTRIES, INC.  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**PROOF OF SERVICE**

(Shalaby v. Irwin – USDC, Northern District of California, Case No: C 06 7026 MJJ)

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years, and not a party to, or interested in the within entitled action. I am an employee of BOWLES & VERNA LLP, and my business address is 2121 N. California Blvd., Suite 875, Walnut Creek, California 94596.

On August 16, 2007, I served the following document(s):

**WORTHINGTON INDUSTRIES, INC.'S CORPORATE DISCLOSURE STATEMENT AND CERTIFICATION OF INTERESTED ENTITIES OR PERSONS**

on the following parties in this action addressed as follows:

**Attorneys for Plaintiffs**

Mark D. Epstein  
Alborg, Veiluva & Epstein LLP  
200 Pringle Avenue, Suite 410  
Walnut Creek, CA 94596  
Tel: (925) 939-9880  
Fax: (925) 939-9915

**Attorneys for Defendant and Third Party Plaintiff**

**Bernzomatic and Defendant The Home Depot**  
J. Phillip Moorhead  
Keller, Price & Moorhead  
229 Avenue I, 2<sup>nd</sup> Floor  
Redondo Beach, CA 90277-5600  
Tel: (310) 540-1332

**XXXX** *(BY MAIL) I caused each such envelope, with postage thereon fully paid, to be placed in the United States mail at Walnut Creek, California. I am readily familiar with the business practice for collection and processing of mail in this office. That in the ordinary course of business said document(s) would be deposited with the U.S. Postal Service in Walnut Creek on that same day. I understand that service shall be presumed invalid upon motion of a party served if the postal cancellation date or postage meter date on the envelope is more than one day after the date of deposit for mailing contained on this affidavit.*

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that I am employed in the office of a member of the Bar of this Court at whose direction the service was made. Executed on August 16, 2007, at Walnut Creek, California.

*Donna Withrow*  
DONNA WITHROW



**FILED**

AUG 16 2007

RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

RICHARD A. ERGO (# 110487)  
CATHLEEN S. HUANG (#219554)  
BOWLES & Verna LLP  
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Attorneys for Third Party Defendant  
Worthington Industries, Inc.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

ANDREW SHALABY, an individual, and SONIA  
DUNN-RUIZ an individual,

Plaintiffs,

vs.

IRWIN INDUSTRIAL TOOL COMPANY, THE  
HOME DEPOT, INC., and DOES 2 through 100,  
inclusive,

Defendants.

BERNZOMATIC,

Third Party Plaintiff,

vs.

WESTERN INDUSTRIES, INC.,  
WORTHINGTON INDUSTRIES, AND DOES 2  
through 100, inclusive,

Third Party Defendants.

CASE NO.: C06-07026 MJJ

Judge Martin J. Jenkins

WORTHINGTON INDUSTRIES, INC.'S  
ANSWER TO BERNZOMATIC'S THIRD  
PARTY COMPLAINT

**BY FAX**

Third Party Defendant Worthington Industries, Inc. ("Worthington") responds to Third Party  
Plaintiff Bernzomatic's Third Party Complaint as follows:



**THE PARTIES**

1  
2 1. Defendant/ Third Party Plaintiff, Bernzomatic, is a Delaware corporation, with its  
3 principal place of business in North Carolina.

4 **RESPONSE:** Worthington is without knowledge or information sufficient to form a belief as to  
5 the truth of the allegations in Paragraph 1 and on that basis denies each and every allegation contained  
6 therein.

7  
8 2. Third Party Defendant, Western Industries, Inc., is a closely-held corporation with its  
9 principal place of business in Wisconsin.

10 **RESPONSE:** Worthington is without knowledge or information sufficient to form a belief as to  
11 the truth of the allegations in Paragraph 2 and on that basis denies each and every allegation contained  
12 therein.

13  
14 3. Third Party Defendant, Worthington Industries, Inc., is an Ohio corporation with its  
15 principal place of business in Ohio.

16 **RESPONSE:** Worthington admits the allegations in Paragraph 3.

17 4. At various times, both Western and Worthington manufactured and sold Bernzomatic-  
18 branded MAPP gas cylinders.

19 **RESPONSE:** Worthington admits that Worthington Cylinders Wisconsin, LLC and Western at  
20 various times manufactured and sold Bernzomatic-branded MAPP gas cylinders. Worthington denies  
21 the remaining allegations in Paragraph 4.

22  
23 5. Worthington purchased Western's cylinder business in September 2004.

24 **RESPONSE:** Worthington admits that Worthington Cylinder Acquisition, LLC purchased  
25 certain assets from Western in September 2004. Worthington denies the remaining allegations in  
26 Paragraph 5.

27 //  
28

1 **JURIDICTION AND VENUE**

2 6. Subject matter jurisdiction is proper in this Court because federal district courts in  
3 California recognize the rights of Third Party Complainant to Declarations of Rights, Breach of  
4 Contract Claims, Contractual Indemnity, Common Law Indemnity and Punitive Damages. This Court  
5 has Personal Jurisdiction over the Third Party Defendants under the California long-arm statute as the  
6 actions or failures to act by the Third Party Defendants caused damage to the Defendant/Third Party  
7 Plaintiff and gave rise to claims in California.  
8

9 **RESPONSE:** Worthington denies that its actions or failures to act caused damage to  
10 Bernzomatic. Worthington is without knowledge or information sufficient to form a belief as to the  
11 truth of the remaining allegations in Paragraph 6 and on that basis denies each and every remaining  
12 allegation contained therein.  
13

14 7. Venue is proper in this Court because all of the Plaintiffs' litigation claims arose in this  
15 jurisdiction, and all of the Third Party Complaint claims are derivative of those litigation claims.

16 **RESPONSE:** Worthington is without knowledge or information sufficient to form a belief as to  
17 the truth of the allegations in Paragraph 7 and on that basis denies each and every allegation contained  
18 therein.  
19

20 **FACTUAL ALLEGATIONS**

21 8. Defendant/ Third Party Plaintiff, Bernzomatic, has been named as a Defendant in the  
22 above-captioned lawsuit (the "Shalaby litigation".) Plaintiffs filed suit on October 10, 2006 and  
23 recently amended their Complaint on June 11, 2007.

24 **RESPONSE:** Worthington admits that Plaintiffs filed suit in or about October 10, 2006 and  
25 amended their complaint on or about June 11, 2007 and that such complaints speak for themselves.  
26 Worthington is without knowledge or information sufficient to form a belief as to the truth of the  
27  
28

1 remaining allegations in Paragraph 8 and on that basis denies each and every remaining allegation  
2 contained therein.

3       9.     The Joint Case Management Statement and Order entered on February 20, 2007 alleges  
4 that Plaintiff, Andrew Shalaby, suffered burns to his face and extremities due to an accident involving a  
5 Bernzomatic-branded MAPP gas cylinder that he used to light a campfire. It further alleges that liquid  
6 MAPP gas inside the pressurized cylinder absorbed energy from the surrounding fire and heated up  
7 such that it vaporized causing the cylinder to produce "an explosive effect."

8  
9       **RESPONSE:** Worthington admits that the February 20, 2007 Joint Case Management  
10 Statement and Order speaks for itself. Worthington is without knowledge or information sufficient to  
11 form a belief as to the truth of the remaining allegations in Paragraph 9 and on that basis denies each  
12 and every remaining allegation contained therein.

13  
14       10.    The Joint Case Management Statement and Order entered on February 20, 2007 states  
15 that fire department personnel who responded during the incident instructed the onsite manager to  
16 discard the product. Depositions of fire department and onsite personnel were taken on April 17, 2007  
17 confirming that the product had been discarded.

18       **RESPONSE:** Worthington admits that the February 20, 2007 Joint Case Management  
19 Statement and Order speaks for itself and that certain depositions of fire department and campground  
20 personnel have been taken. Worthington is without knowledge or information sufficient to form a  
21 belief as to the truth of the remaining allegations in Paragraph 10 and on that basis denies each and  
22 every remaining allegation contained therein.

23  
24       11.    Third Party Defendants, Western and Worthington, manufactured MAPP gas cylinders,  
25 such as the one allegedly involved in this action.

26       **RESPONSE:** Worthington admits that Western and Worthington Cylinders Wisconsin, LLC  
27 manufactured MAPP gas cylinders. Worthington denies the remaining allegations in Paragraph 11 that  
28

1 are directed at Worthington. Worthington is without knowledge or information sufficient to form a  
2 belief as to the truth of the remaining allegations in Paragraph 11 and on that basis denies each and  
3 every remaining allegation contained therein.

4  
5 12. Defendant/Third Party Plaintiff purchased MAPP gas cylinders exclusively from  
6 Western and Worthington during the time periods relevant to this action.

7 **RESPONSE:** Worthington is without knowledge or information sufficient to form a belief as to  
8 the truth of the allegations in Paragraph 12 and on that basis denies each and every allegation contained  
9 therein.

10 13. To the extent that a Bernzomatic-branded MAPP gas cylinder was involved in the  
11 accident which forms the basis of Plaintiffs' Complaint against Bernzomatic and Home Depot, said  
12 MAPP gas cylinder was manufactured by either Western or Worthington.

13  
14 **RESPONSE:** Worthington is without knowledge or information sufficient to form a belief as to  
15 the truth of the allegations in Paragraph 13 and on that basis denies each and every allegation contained  
16 therein.

17 14. Defendant/ Third Party Plaintiff cannot determine whether Western or Worthington  
18 manufactured the MAPP gas cylinder involved because the fire department personnel who responded  
19 during the incident instructed the onsite manager to discard the product and it cannot be recovered.

20  
21 **RESPONSE:** Worthington is without knowledge or information sufficient to form a belief as to  
22 the truth of the allegations in Paragraph 14 and on that basis denies each and every allegation contained  
23 therein.

24 15. Upon information and belief, the written contract between Worthington and Western  
25 regarding the sale of the cylinder business in September 2004 contains an express provision setting  
26 forth a method to facilitate identification of a cylinder's manufacturer if it cannot be determined by a  
27 serial number or other reliable information.  
28

1       **RESPONSE:** Worthington admits that there is a written contract between Worthington  
 2       Cylinder Acquisition, LLC and Western regarding the sale of certain assets and that the contract speaks  
 3       for itself. Worthington denies the remaining allegations in Paragraph 15.

4                               **FIRST CLAIM – DECLARATION OF RIGHTS**

5               16. Defendant/ Third Party Plaintiff incorporates by reference the allegations in Paragraphs 1  
 6       through 15 of this Third Party Complaint as if fully rewritten herein.

7               **RESPONSE:** Worthington refers to Paragraphs 1 through 15 of this Answer to Bernzomatic's  
 8       Third Party Complaint and by this reference incorporates the same herein as though fully set forth.

9               17. Exclusive Supply Agreements between Newell Operating Company (a predecessor to  
 10       Industrial Tool Company, dba Bernzomatic) and Western in 2001, as well as between Irwin Industrial  
 11       Tool Company, dba Bernzomatic, and Worthington in 2006 for Western's and Worthington's MAPP  
 12       gas cylinders included indemnification provisions. In September 2004, Worthington assumed the rights  
 13       and obligations of Western under the 2001 Supply Agreement resulting from Worthington's purchase of  
 14       Western's cylinder business at that time.

15               **RESPONSE:** Worthington admits that supply agreements between Western and Newell  
 16       Operating Company and between Irwin Industrial Tool Company and Worthington Cylinders  
 17       Wisconsin, LLC were entered into and speak for themselves. Worthington denies the remaining  
 18       allegations in Paragraph 17 that are directed at Worthington. Worthington is without knowledge or  
 19       information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 17 and  
 20       on that basis denies each and every remaining allegation contained therein.

21               18. The indemnification provision at page 10 of the Agreement between Newell  
 22       (Bernzomatic) and Western states, in pertinent part:

23               "Western assumes and agrees to indemnify, defend and hold harmless Newell and its affiliates,  
 24       directors, officers, employees and agents for all claims against Newell for personal injury or  
 25

1 property damage to the extent such injury or damage is alleged to be caused by or is caused by  
2 the sale or distribution of Covered Cylinders supplied under this Agreement that were not  
3 suitable for sale, distribution or use due to the design, manufacture, labeling or failure to label,  
4 or storage prior to delivery to Newell of such Covered Cylinders. Western further agrees to  
5 indemnify, defend and hold harmless Newell and its affiliates, directors, officers, employees and  
6 agents for all claims against Newell resulting from the failure to manufacture products in  
7 accordance with applicable laws including environmental and labor laws.”  
8

9 **RESPONSE:** Worthington admits that the supply agreement between Western and Newell  
10 Operating Company speaks for itself. Worthington is without knowledge or information sufficient to  
11 form a belief as to the truth of the remaining allegations in Paragraph 18 and on that basis denies each  
12 and every remaining allegation contained therein.  
13

14 19. The indemnification provision at page 8 of the Agreement between Irwin Industrial Tool  
15 Company (Bernzomatic) and Worthington states, in pertinent part;

16 “WCW (Worthington) assumes and agrees to indemnify, defend and hold harmless Bernzomatic  
17 and its customers, affiliates, directors, officers, employees and agents for all claims against  
18 Bernzomatic for personal injury or property damage to the extent such injury or damage is  
19 alleged to be cause(d) by or is caused by in whole or in part the sale or distribution of Covered  
20 Cylinders supplied under this Agreement that were not suitable for sale, distribution or use due  
21 to the design, manufacture, labeling or failure to label (except as provided in Section 4.4), or  
22 storage prior to delivery to Bernzomatic of such Covered Cylinders. WCW further agrees to  
23 indemnify, defend and hold harmless Bernzomatic and its affiliates, directors, officers,  
24 employees and agents for all claims against Bernzomatic resulting from the failure to  
25 manufacture products in accordance with applicable laws.”  
26  
27  
28



1       **RESPONSE:** Worthington admits that the supply agreement between Bernzomatic and  
2 Worthington Cylinders Wisconsin, LLC speaks for itself. Worthington denies the remaining allegations  
3 in Paragraph 19 that are directed at Worthington. Worthington is without knowledge or information  
4 sufficient to form a belief as to the truth of the remaining allegations in Paragraph 19 and on that basis  
5 denies each and every remaining allegation contained therein.  
6

7       20. The allegations in the Shalaby litigation are for personal injury caused by the sale or  
8 distribution of covered cylinders – (a Bernzomatic-branded MAPP gas cylinder) – manufactured and  
9 sold by Western and Worthington pursuant to the Supply Agreements, which contained the above-cited  
10 indemnification provisions.

11       **RESPONSE:** The allegations in the Shalaby litigation speak for themselves. Worthington  
12 denies the remaining allegations in Paragraph 20 that are directed at Worthington. Worthington is  
13 without knowledge or information sufficient to form a belief as to the truth of the remaining allegations  
14 in Paragraph 20 and on that basis denies each and every remaining allegation contained therein.  
15

16       21. Pursuant to the indemnification provisions, Bernzomatic tendered its defense and  
17 indemnification to Western on June 19, 2006, and to Worthington on January 24, 2007.

18       **RESPONSE:** Worthington admits that Bernzomatic tendered the defense of the Shalaby matter  
19 to Worthington. Worthington is without knowledge or information sufficient to form a belief as to the  
20 truth of the remaining allegations in Paragraph 21 and on that basis denies each and every remaining  
21 allegation contained therein.  
22

23       22. To date, Western has neither defended nor indemnified Bernzomatic, which is a breach  
24 of the indemnification provision in the Supply Agreement.

25       **RESPONSE:** Worthington is without knowledge or information sufficient to form a belief as to  
26 the truth of the allegations in Paragraph 22 and on that basis denies each and every allegation contained  
27 therein.  
28

23. To date, Worthington, has neither defended nor indemnified Bernzomatic, which is a breach of the indemnification provision in the Supply Agreement.

**RESPONSE:** Worthington admits that it has not defended nor indemnified Bernzomatic. Worthington denies the remaining allegations in Paragraph 23.

24. An actual dispute exists between Defendant/Third Party Plaintiff and Plaintiffs, Andrew Shalaby and Sonia Dunn-Ruiz.

**RESPONSE:** Worthington admits that a dispute exists between Plaintiffs and Irwin Industrial Tool Company. Worthington is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 24 and on that basis denies each and every remaining allegation contained therein.

25. Bernzomatic is entitled to a declaration of rights under the contracts against Western and Worthington and the obligations under the indemnification provisions of the Supply Agreement as follows:

a. Western is obligated under the indemnification provisions of the Supply Agreement and by virtue of its breach of its duty to defendant Bernzomatic in the Shalaby litigation, to indemnify Bernzomatic with respect to the full amount of all defense costs and any liability or settlement in the Shalaby litigation without any cost sharing, apportionment between particular claims or allegations, or limitation on amount.

**RESPONSE:** Worthington is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 25(a) and on that basis denies each and every allegation contained therein.

b. Worthington is obligated under the indemnification provisions of the Supply Agreement and by virtue of its breach of its duty to defendant Bernzomatic in the Shalaby litigation, to indemnify Bernzomatic with respect to the full amount of all defense costs and any liability or



1 settlement in the Shalaby litigation without any cost sharing, apportionment between particular claims  
 2 or allegations, or limitation on amount.

3 **RESPONSE:** Worthington denies the allegations in Paragraph 25(b).

4 **SECOND CLAIM – BREACH OF CONTRACT/CONTRACTUAL INDEMNIFICATION**

5 26. Defendant/Third Party Plaintiff incorporates by reference the allegations in Paragraphs 1  
 6 through 25 of this Complaint as if fully rewritten herein.

7 **RESPONSE:** Worthington refers to Paragraphs 1 through 25 of this Answer to Bernzomatic's  
 8 Third Party Complaint and by this reference incorporates the same herein as though fully set forth.

9 27. Western has breached its express and implied obligations under the Supply Agreement  
 10 because it has failed to defend and indemnify Defendant/Third Party Plaintiff and hold it harmless with  
 11 respect to any of the amounts Defendant/Third Party Plaintiff has incurred and will incur in the future  
 12 because of the Shalaby litigation.

13 **RESPONSE:** Worthington is without knowledge or information sufficient to form a belief as to  
 14 the truth of the allegations in Paragraph 27 and on that basis denies each and every allegation contained  
 15 therein.

16 28. Such breach of contract by Western has directly and proximately caused injury to  
 17 Defendant/Third Party Plaintiff, including, but not limited to, the payment of the entire cost of the  
 18 Shalaby litigation and the payment of fees and expenses in defending the Shalaby litigation.

19 **RESPONSE:** Worthington is without knowledge or information sufficient to form a belief as to  
 20 the truth of the allegations in Paragraph 28 and on that basis denies each and every allegation contained  
 21 therein.

22 29. Worthington has breached its express and implied obligations under the Supply  
 23 Agreement because it has failed to defend and indemnify Defendant/Third Party Plaintiff and hold it  
 24

1 harmless with respect to any of the amounts Defendant/Third Party Plaintiff has incurred and will incur  
2 in the future because of the Shalaby litigation.

3 **RESPONSE:** Worthington denies the allegations in Paragraph 29.

4 30. Such breach of contract by Worthington has directly and proximately caused injury to  
5 Defendant/Third Party Plaintiff, including, but not limited to, the payment of the entire cost of the  
6 Shalaby litigation and the payment of fees and expenses in defending the Shalaby litigation.

7 **RESPONSE:** Worthington denies the allegations in Paragraph 30.

8 **THIRD CLAIM – EQUITABLE INDEMNIFICATION**

9  
10 31. Defendant/Third Party Plaintiff incorporates by reference the allegations in Paragraphs 1  
11 through 30 of this Complaint as if fully rewritten herein.

12 **RESPONSE:** Worthington refers to Paragraphs 1 through 30 of this Answer to Bernzomatic's  
13 Third Party Complaint and by this reference incorporates the same herein as though fully set forth.

14 32. Third Party Defendants, Western and Worthington, manufactured Bernzomatic-branded  
15 MAPP gas cylinders and introduced those cylinders into the stream of commerce by selling them to  
16 Defendant/Third Party Plaintiff.

17 **RESPONSE:** Worthington admits that Western and Worthington Cylinders Wisconsin, LLC  
18 manufactured Bernzomatic-branded MAPP gas cylinders. Worthington admits that Worthington  
19 Cylinders Wisconsin, LLC sold such cylinders to Irwin Industrial Tool Company. Worthington admits  
20 that Western sold such cylinders to Newell Operating Company. Worthington denies the remaining  
21 allegations in Paragraph 32 that are directed at Worthington. Worthington is without knowledge or  
22 information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 32 and  
23 on that basis denies each and every remaining allegation contained therein.

24 33. To the extent that the MAPP gas cylinder at issue is held to be defective, which  
25 Defendant/Third Party Plaintiff expressly denies, one of the Third Party Defendants, Western and/or  
26

1 Worthington, introduced that defect by manufacturing and selling MAPP gas cylinders to  
2 Defendant/Third Party Plaintiff for further distribution and resale to the Plaintiffs.

3 **RESPONSE:** Worthington is without knowledge or information sufficient to form a belief as to  
4 the truth of the allegations in Paragraph 33 and on that basis denies each and every allegation contained  
5 therein.  
6

7 34. To the extent that the MAPP gas cylinder at issue is held to have caused injuries and  
8 damages to Andrew Shalaby and Sonia Dunn-Ruiz, which Defendant/Third Party Plaintiff expressly  
9 denies, Third Party Defendants, Western and Worthington, are liable for those injuries as a result of the  
10 manufacture and sale of those MAPP gas cylinders to Defendant/Third Party Plaintiff for further  
11 distribution and resale.

12 **RESPONSE:** Worthington denies the allegations in Paragraph 34 that are directed at  
13 Worthington. Worthington is without knowledge or information sufficient to form a belief as to the  
14 truth of the remaining allegations in Paragraph 34 and on that basis denies each and every remaining  
15 allegation contained therein.  
16

17 35. Because the cylinder product was discarded well before any lawsuit or involvement of  
18 the Defendant/Third Party Plaintiff, there is no way to discover whether Western or Worthington  
19 manufactured the cylinder at issue.  
20

21 **RESPONSE:** Worthington denies the allegations in Paragraph 35.

22 36. Because it is certain that the manufacturer of the cylinder at issue was either Western or  
23 Worthington, both Western and Worthington owe indemnity to the Defendant/Third Party Plaintiff for  
24 any alleged harm caused by the cylinder.

25 **RESPONSE:** Worthington denies the allegations in Paragraph 36 that are directed at  
26 Worthington. Worthington is without knowledge or information sufficient to form a belief as to the  
27  
28

1 truth of the remaining allegations in Paragraph 36 and on that basis denies each and every remaining  
2 allegation contained therein.

3 37. Thus, as a result of their actions, Third Party Defendants, Western and Worthington, owe  
4 a complete common law duty of indemnification to Defendant/Third Party Plaintiff for all damages,  
5 costs, expenses and fees associated with the Shalaby litigation.  
6

7 **RESPONSE:** Worthington denies the allegations in Paragraph 37 that are directed at  
8 Worthington. Worthington is without knowledge or information sufficient to form a belief as to the  
9 truth of the remaining allegations in Paragraph 37 and on that basis denies each and every remaining  
10 allegation contained therein.

11 **FOURTH CLAIM- THIRD PARTY BENEFICIARY**

12 38. Defendant/Third Party Plaintiff incorporates by reference the allegations in Paragraphs 1  
13 through 37 of this Complaint as if fully rewritten herein.  
14

15 **RESPONSE:** Worthington refers to Paragraphs 1 through 37 of this Answer to Third Party  
16 Plaintiff's Third Party Complaint and by this reference incorporates the same herein as though fully set  
17 forth.

18 39. Defendant/Third Party Plaintiff is an intended third party beneficiary of the contract  
19 between Western and Worthington for the sale of the cylinder business in September 2004, wherein an  
20 express method was provided for determining which manufacturer is responsible for a cylinder when it  
21 cannot be determined by serial number or other reliable information.  
22

23 **RESPONSE:** Worthington admits that the contract between Western and Worthington  
24 Cylinder Acquisition, LLC speaks for itself. Worthington denies the remaining allegations in Paragraph  
25 39.

26 //

27 //

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